1496.

# SUPREME COURT OF THE UNITED STATES.

No. 34, OF JANUARY TERM, 1833.

---

## H. MAGNIAC AND AL., PLAINTIFFS IN ERROR,

VS.

## JOHN R. THOMPSON.

---

IN ERROR TO THE CIRCUIT COURT U. S., FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

---

INDEX.


| | Original. | Print. |
|---|---|---|
| Citation | 1 | 1 |
| Writ of error | 3 | 1 |
| Agreement of counsel | 4 | 2 |
| Declaration | 5 | 4 |
| Defendant's plea | 6 | 4 |
| Verdict and judgment | 7 | 5 |
| Clerk's certificate | 7 | 5 |
| Plaintiffs' prayer for a reversal | 8 | 6 |
| Bill of exceptions | 9 | 6 |


GIDEON, print.

UNITED STATES, *District of Pennsylvania, sct.*

To John R. Thomson:

Whereas, by a writ of error issuing out of the Supreme Court of the United States, directed to the judges of the circuit court of the United States, holden in and for the district of Pennsylvania, in the third circuit, wherein Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., are the complainants, the said judges are directed to send the record and process of a certain suit, with all things concerning them, so that the same may be had before the chief justice and associate justices of the Supreme Court of the United States on the first Monday of August next, at the city of Washington, being the seat of national government, in which suit Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., are original plaintiffs, and you, the said John R. Thomson, defendant, in a plea of trespass on the case, &c.; that the record and process aforesaid being inspected, they, the said supreme court, may cause to be done thereupon what of right ought to be done. And the said Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., having made an assignment of errors, and given good and sufficient security that the plaintiffs in error shall prosecute their said writ of error to effect, and answer all such costs as, upon an affirmance of the judgment of the said circuit court, may be adjudged to the respondent in error, you are hereby cited to appear (if you see cause) at the said supreme court, at the time and place aforesaid, to answer to the said writ of error, and the errors assigned by the said Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co.

Given under my hand and seal, this seventh day of June, one thousand eight hundred and thirty-one.

[L. S.]

JOS. HOPKINSON.

Service accepted by

J. P. NORRIS, Jr., *for def't.*

UNITED STATES, *sct.*

The President of the United States, to the judges of the circuit court of the United States, holden in and for the district of Pennsylvania, in the third circuit, greeting:

[L. S.]

Because that, in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., plaintiffs, and John R. Thomson, defendant, in a plea of trespass on the case, &c., a manifest error has intervened, to the great damage of the said Hollingsworth Magniac, Dan-

iel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., as in their complaint has been stated; and it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf; you are hereby commanded that, if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the first Monday of August next, at the city of Washington, being the seat of national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable John Marshall, chief justice of the Supreme Court of the United States, at Washington aforesaid, this day of , in the year of our Lord one thousand eight hundred and thirty-one, and of the independence of the United States the fifty-fifth.

D. CALDWELL,
*Clerk circuit court.*

Allowed by

JOS. HOPKINSON.

UNITED STATES, *District of Pennsylvania, sct.*

Be it remembered, that heretofore, to wit, on the third of June, in the year of our Lord one thousand eight hundred and thirty-two, agreements in writing were filed in the circuit court of the United States, in and for the district of Pennsylvania, in the third circuit; which said agreements are in the words and figures, and of the tenor following, that is to say:

HOLLINGSWORTH MAGNIAC, Daniel Snaith Magniac, & Wm. Jardine, trading under the firm of Magniac & Co.,
vs.
JOHN R. THOMSON.
} No. 18.

Circuit court of the United States, eastern district of Pennsylvania, October sessions, 1826.

Whereas the above named plaintiffs did recover, on the 26th November, 1827, against the said John R. Thomson, the sum of twenty thousand nine hundred and twenty-nine dollars and seven cents damages, besides costs of suit; and whereas the said plaintiffs allege that the said John R. Thomson has the means of satisfying said judgment and costs, and the said John R. Thomson denies his ability to pay the same, and requires that the proof thereof may be tried by a jury, and an issue for the trial thereof has been agreed upon between the parties, in the circuit court of the United States, for the eastern district of Pennsylvania, to April sessions, 1830, it is hereby ordered and agreed, that the action,

as above stated, be entered, and that the said John R. Thomson cause an appearance to be entered for him to the same, and that said plaintiffs declare of the said term of a discourse had and moved between the said plaintiffs and the said defendant, of and concerning whether the said defendant has the means, by the property in his marriage settlement, or otherwise, of satisfying the judgment aforesaid; and that the said defendant, in consideration of a mutual promise on the part of the said plaintiffs to him made, did promise to pay to the said plaintiffs the sum of twenty-five thousand dollars, in case he, the said defendant, has the means or ability of satisfying the judgment aforesaid, so that this said issue may be tried by the country.

And it is further ordered and agreed, that the circumstances of the said mutual promises, and of the affirmations and assertions laid in the declaration, shall be confessed, so that the said issue may be tried on the merits, and that the costs of the suit shall follow the verdict; but that the said verdict shall give no title to either party to recover from the other the sum laid in the declaration; the merits to be tried without regard to form, and either party to be at liberty, under the direction of the court, to modify or change the pleadings, so as to facilitate such trial on the merits.

C. J. INGERSOLL,
*For plaintiffs.*
J. P. NORRIS, Jr.,
*Att'y for J. R. Thomson.*

3d June, '30.

MAGNIAC & Co.
vs.
JOHN R. THOMSON.

Whereas a feigned issue has been agreed upon between the parties in this case, for the purpose of ascertaining by law whether the defendant, John R. Thomson, has the means, by the property in his marriage settlement, or otherwise, of satisfying the judgment recovered against him in this court, to October sessions, 1826, No. 18.

Now, it is hereby agreed to be the understanding of the parties to this suit, that, if the plaintiff recovers, *that* the liability of the security from said defendant shall be to the extent of the property actually settled by said defendant on his then intended wife, by virtue of a marriage settlement dated the day of December, 1825. And if judgment shall be for the defendant, that the said property contained in said settlement shall be entirely discharged, and the security entered, as above stated, entirely at an end; either party to be at liberty to carry the case, according to established regulations, to the Supreme Court of the United States for determination.

C. J. INGERSOLL,
J. P. NORRIS, Jr.,
*Att'y for J. R. Thomson.*

3d June, 1830.

Whereupon the said Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., by their attorney, Charles J. Ingersoll, esquire, complain, that whereas, on the first day of April, one thousand eight hundred and thirty, at the district aforesaid, a certain discourse was had and moved, by and between the said plaintiffs and said John R. Thomson, of and concerning a certain judgment which they had recovered against him; upon which said discourse the said plaintiffs did then and there affirm that the said John R. Thomson did promise to pay them, the said plaintiffs, the amount of the judgment recovered in this court, in a suit therein brought to October sessions, 1826, No. 18; which said affirmation of said plaintiffs the said John R. Thomson did then and there deny. And thereupon the said John R. Thomson, afterwards, to wit, the same day and year aforesaid, at the district aforesaid, in consideration that the said plaintiffs, at the special instance and request of the said John R. Thomson, have taken on themselves, and faithfully promised the said John R. Thomson to pay him the sum of twenty-five thousand dollars if the said John R. Thomson has not the means of satisfying the judgment aforesaid, as recovered in the suit aforesaid; he, the said John R. Thomson upon himself did assume, and then and there faithfully promised the said plaintiffs to pay them the said sum of twenty-five thousand dollars if he, the said John R. Thomson, has the means or ability to satisfy the judgment aforesaid, as recovered in the suit aforesaid. And the said plaintiffs aver that the said John R. Thomson has the means and ability to pay the judgment aforesaid, as recovered in the suit aforesaid, to wit, on the day and year aforesaid, at the district aforesaid, whereof the said John R. Thomson had notice. Nevertheless, the said John R. Thomson, his promise and undertaking aforesaid not regarding, hath not yet paid to the said plaintiffs the said sum of money recovered as aforesaid in the suit aforesaid, nor any part thereof, although to do the same the said John R. Thomson afterwards, to wit, on the day and year aforesaid, at the district aforesaid, by the said plaintiffs was required; but the same to them to pay hath hitherto refused, and still doth refuse, to the damage of the said plaintiffs thirty thousand dollars, and therefore they bring suit, &c.

And the said John R. Thomson, by his attorney, Joseph Parker Norris, jr., esquire, comes and defends the force and injury, when, &c., and saith, that well and true it is that he, the said John R. Thomson, for himself did assume, in manner and form as they, the said plaintiffs, against him have declared; but the said defendant further saith, that the said plaintiffs their action aforesaid against him ought not to have and maintain, because he saith, that he has not the ability to pay the judgment aforesaid, as recovered in the suit aforesaid, as by said declaration is supposed; and of this he puts himself upon the country.

And the said Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., do the like.

Therefore, let a jury thereupon come before the said judges, at Philadelphia aforesaid, on the eleventh day of October next, by whom, &c., and who neither, &c., to recognise, &c., because as well, &c. The same day is given to the parties aforesaid, then and there, &c. On which said eleventh day of October, one thousand eight hundred and thirty, come the parties aforesaid, by their attorneys aforesaid, and further day is given to the parties aforesaid until the 11th day of April next; therefore, as before, let a jury thereupon come before the said judges, at Philadelphia aforesaid, on the eleventh day of April next, by whom, &c., and who neither, &c., to recognise, &c., because as well, &c.; the same day is given to the parties aforesaid, then and there, &c. On which said eleventh day of April, one thousand eight hundred and *and* thirty-one, come the parties aforesaid, by their attorneys aforesaid; and now in this same session, to wit, on the twelfth day of April, in the year last aforesaid, the jurors of the jury aforesaid being called likewise come, to wit, Henry Cope, Archibald McCall, Thomas Morris, Samuel Palmer, Patrick Hays, Reuben Etting, Edward Randolph, jr., David Lapsley, jr., Joseph Price, Charles Pettit, Topliff Johnson, George L. Morgan, who, being duly empannelled, returned, chosen, tried, and sworn or affirmed, to speak the truth of the matter within contained, upon their oaths and affirmations aforesaid, respectively do say, that they find for the defendant, with six cents costs.

Wherefore it is considered by the court here, that the said Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., take nothing by their writ aforesaid, but that they be in mercy, &c.; and *and* that the said John R. Thomson go thereof without day, &c. And it is also considered by the court here, that the said John R. Thomson recover against the said Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., the sum of twenty-two dollars and sixty cents, by the court here to him adjudged for his costs and charges, &c.

UNITED STATES, *District of Pennsylvania, sct.*

I certify the foregoing to be a true and faithful copy of the record of the judgment of the circuit court of the United States, in and for the district of Pennsylvania, in the third circuit, in a certain action of trespass on the case therein lately depending, between Hollingsworth Magniac, Daniel Snaith Magniac, and William Jardine, trading under the firm of Magniac & Co., plaintiffs, and John R. Thomson, defendant.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of said court, at Philadelphia, this seventh [L. S.] day of June, A. D. 1831, and in the fifty-fifth year of the independence of the said United States.

D. CALDWELL,
*Clerk circuit court.*

The plaintiffs in this case submit to the Supreme Court of the United States a prayer for the reversal of the judgment of the circuit court of the United States for the Pennsylvania district, and an assignment of errors, as follows, to wit:

The charge of the court instructed the jury that, under the circumstances in evidence, the law is against the plaintiffs; that the marriage settlement in question would be valid unless all the parties thereto were guilty of fraud; that marriage is a sufficient consideration for settlement; and left to the jury nothing to find, by their verdict, but whether the defendant's wife and father were equally guilty with the defendant, in the alleged contrivance to defeat the plaintiffs; arguing, as the charge does throughout, that the verdict should be for the defendant.

C. J. INGERSOLL, *for the pl'ffs.*

Be it remembered, that on the third day of June, in the year one thousand eight hundred and thirty, to the April sessions of that year, into the circuit court of the United States, for the Pennsylvania district, came Hollingsworth Magniac, David Snaith Magniac, and William Jardine, aliens and subjects of the King of Great Britain and Ireland, trading under the firm of Magniac and Company, by their attorney, duly constituted, and impleaded John R. Thomson, a citizen of the State of New Jersey, who, by his attorney duly constituted, entered an amicable action in the State and eastern district of Pennsylvania, in the terms following, to wit:

Circuit court, U. States, east'n district of Pennsyl'a, Oct. sessions, 1826. No. 18.

HOLLINGSWORTH MAGNIAC, DANIEL SNAITH MAGNIAC, and WILLIAM JARDINE, trading under the firm of Magniac & Co.,
vs.
JOHN R. THOMSON.

Whereas the above named plaintiffs did recover on the twenty-sixth of November, one thousand eight hundred and twenty-seven, against the said John R. Thompson, the sum of twenty thousand nine hundred and twenty-nine dollars and seven cents, damages, besides costs of suit; and whereas the said plaintiffs allege that the said John R. Thomson has the means of satisfying said judgment and costs, and the said John R. Thomson denies his ability to pay the same, and requires that the proof thereof may be tried by a jury, and an issue for the trial thereof has been agreed upon, between the parties, in the circuit court of the United States, for the eastern district of Pennsylvania, to April sessions, 1830, it is hereby ordered and agreed that the action, as above stated, be entered, and that the said John R. Thomson cause an appearance to be entered for him to the same, and that said plaintiffs declare if the said term of a discourse had and moved between the said plaintiffs and the said defendant, of and concerning whether

the said defendant has the means, by the property in his marriage settlement, or otherwise, of satisfying the judgment aforesaid; and that the said defendant, in consideration of a mutual promise on the part of the said plaintiffs to him made, did promise to pay to the said plaintiffs the sum of twenty-five thousand dollars, in case he, the said defendant, has the means or ability of satisfying the judgment aforesaid, so that this said issue may be tried by the country; and it is further ordered and agreed, that the circumstances of the said mutual promises, and of the affirmations and assertions laid in the declaration, shall be confessed, so that the trial may be on the merits; and that the costs of the suit shall follow the verdict; but that the said verdict shall give no title to either party to recover from the other the sum laid in the declaration; the merits to be tried without regard to form, and either party to be at liberty, under the direction of the court, to modify or change the pleadings, so as to facilitate such trial on the merits.

Whereupon the plaintiff declared as follows:

[Insert the declaration.]

Which issue was tried before a special jury, duly empannelled for that purpose, and the honorable Henry Baldwin and Joseph Hopkinson, judges of the said court, on the twelfth day of April, one thousand eight hundred and thirty-one, at the city of Philadelphia, in the said Pennsylvania district, when, to maintain the said issue for the plaintiffs, was given in evidence the following deed, to wit:

Articles of agreement and covenant, made and executed this nineteenth day of December, in the year of our Lord one thousand eight hundred and twenty-five, by and between John R. Thomson, esq., late of the city of Philadelphia, of the first part; Annis Stockton, daughter of Richard Stockton, esq., of the second part; and Richard Stockton, of the county of Somerset and State of New Jersey, father and trustee of the said Annis Stockton, of the third part.

Whereas a marriage is intended to be shortly had and solemnized between the said John R. Thomson and the said Annis Stockton, and whereas the said Richard Stockton has promised to give unto his said daughter a certain lot or tract of land, belonging to him, situate in the county of Middlesex and State of New Jersey, directly opposite the mansion house of the said Richard Stockton, between the old road to Trenton and the turnpike road, which consists of between four or five acres of land, be the same more or less, and is bounded on the north and south by the said roads, on the west by lands of Doctor John Vanclave, and the east by a line to be run from the northeast corner of the garden now in the possession of Mrs. Abigail Field to the said turnpike road, upon which said lot the said John R. Thompson has begun to build a house; now it is hereby agreed, between the parties aforesaid and the said Richard Stockton, for himself and his heirs, doth hereby covenant and agree, to and with the parties of the first and second parts, their heirs, executors, and administrators, in considera-

tion of the said marriage, and of the love and natural affection he hath for his said daughter, that, from the time of and immediately after said marriage shall be solemnized, he, the said Richard Stockton, shall and will stand seized of the said lot and premises, and of all and singular the buildings and improvements which shall be made and erected thereon by the said party of the first part, to uses, trusts, and purposes hereinafter mentioned, and to none other, that is to say: In trust to permit the said John R. Thomson and Annis, his wife, during the time of their joint lives, to possess, live in, and occupy the said lot, house, and premises, with the appurtenances, free and clear of all demands, and in case the said parties of the first and second parts do not think proper to inhabit and reside in the said premises, that he, the said Richard Stockton, will let out upon lease the said premises, and receive the rents, issues, and profits thereof, and pay over the same to the said Annis, party of the second, during the joint lives of the parties of the first and second parts; and if the said John R. Thomson should survive the said Annis Stockton, and have issue by her, then in trust to permit the said John R. Thomson, during his life, to inhabit and occupy the said premises, if he elect so to do, free and clear as aforesaid, and pay over the said rents and profits as he shall receive the same to the said John R. Thomson, for the maintenance and support of him and his family, without he, the said John R. Thomson, being at any time thereafter accountable to any person or persons for the said rents and profits; and after the death of the said John R. Thomson, in trust for the child or children of the said marriage, in equal shares as tenants in common, in fee simple; and if there shall be no child or children of the said marriage, then, upon the death of either of the said parties of the first and second parts, in trust to convey the said premises to the survivor in fee simple; and the said John R. Thomson, for himself, his heirs, executors, and administrators, doth covenant and agree, to and with the parties of the second and third parts, that if the said marriage shall take effect, and in consideration thereof, he will, with all convenient speed, build and furnish the said house in a suitable manner as he shall judge fit and proper, and that the said erections, improvements, and furniture, together with the changes and additions which shall be from time to time made, shall be subject to and included in the said trusts as far as the same are applicable to each species of property; and further, that he will in the space of one year from the time the said marriage shall take effect, place out on good security, in stock or otherwise, the sum of forty thousand dollars, and hand over and assign the evidences thereof to the said party of the third part, who shall hold the same in trust, to receive the interest, profits, or dividends thereon as they shall from time to time arise, to the said party of the second part during the joint lives of the parties of the first and second parts; and that the receipts for the same, and also for what may be produced under her before mentioned trusts, shall be good and valid, notwithstanding her coverture. If the said party of the second part should die before the said party of the first part, and there should be issue of the said marriage,

then in trust to receive the said interest, profits, and dividends, and pay the same over from time to time to the said party of the first part, during his life, for the support of himself and the maintenance and education of his children, without his being subject to any account as aforesaid, and after his death in trust for any child or children of the said marriage in equal shares; and if the said Annis should survive the said John, and there be issue of the said marriage, then to pay over the same to the said Annis during her life for her maintenance, and the support and education of the said children, and without her being liable to any account for the same, and after her death in trust for the child or children of the said marriage in equal shares; and if there shall be no child or children of the said marriage, then, upon the death of the said John R. Thomson, or Annis his wife, in trust, to assign and deliver the said securities, and all moneys remaining due, to the one who shall survive, to his or her own uses. And it is further agreed and covenanted, by and between the parties aforesaid, that it may be lawful for the said John R. Thomson to act as the agent of the parties aforesaid in all the matters aforesaid, by the permission, and under the control if need be, of the said trustee, and to change, and from time to time alter, the said securities as occasion may require, and take new securities in their stead, so as that the fund as aforesaid settled shall always be kept good. And it is also hereby further agreed and covenanted, by and between all the said parties, that the said trustee shall not be held guilty of breach of trust, although he does not act personally in the premises, unless he be expressly desired and requested so to do by one of the other parties hereto, or those claiming under them, and that he shall not in any manner be held liable as trustee unless for acts of wilful neglect or misconduct.

In witness whereof, &c.

JNO. R. THOMSON, [SEAL.]
ANNIS STOCKTON, [SEAL.]
RICHARD STOCKTON. [SEAL.]

Sealed and delivered in presence of—(the words "during his life" near the bottom of the first sheet, being first interlined:)

JULIA STOCKTON,
WILLIAM B. STOCKTON.

STATE OF NEW JERSEY.

Be it known, that on this fifth day of April, eighteen hundred and thirty, before me, James L. Green, one of the masters of the court of chancery, personally appeared Julia Stockton, of lawful age, who being duly sworn according to law, did depose and say, that she is one of the subscribing witnesses to the foregoing instrument; that she saw Richard Stockton, since deceased, John R. Thomson, and Annis Stockton, sign, seal, and deliver the same on the day it bears date, and that William B. Stockton subscribed his name as a witness thereto at the same time.

JULIA STOCKTON.

Sworn and subscribed the day and year above written, before me—
JAS. GREEN, *Master.*

Received in Middlesex, clerk's office, May 22d, 1830, and recorded in book 22 of Deeds, pages 345, 346, and 347, by
F. S. VANARSDALEN, *Clerk.*

And the written deposition of Robert Stockton, as follows:

R. F. Stockton, of Princeton, New Jersey, being duly sworn, says, that prior to October, one thousand eight hundred and twenty-nine, the defendant above handed over to deponent, as trustee for Annis Stockton Thomson, his sister, securities for the payment of nine thousand five hundred dollars, which said securities were enclosed in a note addressed to deponent as trustee aforesaid; that deponent has mislaid said securities, and upon diligent search has not been able to find them, nor the note in which they were enclosed. Deponent thinks it was in September, 1829, that he received the said securities from defendant; he recollects that it was before the October court in 1829.

Cross examination waived by C. J. Ingersoll, esq., with right to send interrogatories to deponent.

R. F. STOCKTON.

Sworn and subscribed before me, the 28th October, 1830.
G. BARTRAM, *Aldr.*

Circuit court of the United States, for the district of Pennsylvania.

MAGNIAC
vs.
THOMSON.

Interrogatories by the plaintiff, saving all legal exceptions, to Robert F. Stockton, esq., a witness produced by defendant.

1. Do you know whether your late father conveyed to John R. Thomson the lot or ground on which his house, at or near Princeton, is erected? If so, when, by what conveyance, when acknowledged, when registered or recorded; please to cause a copy of it to be annexed to your answer.

How much ground, if any, was so conveyed, and what was it worth when conveyed?

2. What did the house and other improvements, put on the said lot or ground by John R. Thomson, cost him; did you ever hear him say, or do you know, or can you give a probable estimate of such cost?

What did the furnishing of said house cost; did you ever hear John R. Thomson say, or do you know, or can you give, a probable estimate of such cost?

3. Did John R. Thomson, within the space of a year from the time of his marriage, place out on good security, in stock or otherwise, the sum of forty thousand dollars, and hand over or assign the evidence

thereof to your father, as trustee for his daughter, the wife of the said John R. Thomson; did he so hand over or assign the evidence thereof to your father as trustee for his daughter, the wife of John R. Thomson; did he so hand over or assign any other sum to your father, as trustee; if so, what has become of the same?

Please to annex to your answer a copy of the note which in your examination in chief you say was addressed to you by John R. Thomson, enclosing securities amounting to nine thousand five hundred dollars, for your sister; also copies, as, if you cannot find the originals to copy, please to state the substance of the said securities, whether promissory notes, certificates of stock, mortgages, or whatever else they were; and state if John R. Thomson mentioned, or otherwise signified to you why he delivered the same to you at that time; and why he had not delivered them to you before. Please to state, also, as well as you can recollect, the substance of the note from him to you, enclosing the said securities, if you can not find it on further search.

C. J. INGERSOLL, *for plaintiff's.*

15th November, 1830.

Circuit court United [States], district of Pennsylvania.

MAGNIAC
vs.
JOHN R. THOMSON.

Answers by Robert Stockton, to interrogatories by

1st. Robert Stockton being duly sworn, and , that his late father did not convey to said John R. Thomson the lot of ground in Princeton, on which said Thomson built a house in the years 1825, 1826, but covenanted to stand seized of said (prout deed) in trust for his daughter, Annis Thomson, the wife of defendant; and deponent believes that said lot contains three or four acres.

2nd. Deponent believes that said house cost said defendant about twelve, and the furniture therein about four, thousand dollars, but has no positive knowledge on the subject.

3d. The said defendant did not, within the space of one year from the time of his marriage place out on good security, in stock or otherwise, the sum of forty thousand dollars, and hand over or assign the evidences thereof to the deponents's father, as trustee for his daughter, the wife of defendant, nor any other sum. But during the year 1829, (after the decease of defendant's father,) the said defendant addressed to deponent a note, enclosing securities, amounting to nine thousand five hundred dollars, for the wife of defendant, in part performance of his marriage settlement. That said note with the securities are either lost or mislaid, and deponent has not been able to find them or either of them after a diligent search. That one of said notes was drawn by deponent in favor of, and endorsed by said defendant, for the payment of five thousand dollars with interest, and the other deponent believes

was a note drawn by William H. Morris, in favor of and endorsed by defendant, for four thousand five hundred dollars. That the contents of said notes from defendant to deponent, enclosing said securities, was that said enclosed notes were sent to deponent, as trustee of his sister, Annis Thomson; and that they were all the proceeds of his affairs; and that it was in performance of his marriage settlement, as far as he could comply therewith, but did not state why he had not done it before.

R. F. STOCKTON.

Sworn and before me, this 3d day of March, 1831, at the city and county of New York.

THOS. JEFFERSON SMITH
*Pennsylvania commissioner.*

STATE OF NEW YORK,
*City and county of New York, ss.*

Be it known, to all whom it shall or may concern, that I, Thomas Jefferson Smith, commissioner in and for the State of New York, duly commissioned by the Governor of the Commonwealth of Pennsylvania, (by virtue of an act of the legislature of the State of Pennsylvania, entitled an "act to authorize the appointment of commissioners to take acknowledgment and proof of deeds, and instruments under seal, or depositions,") do hereby certify, that on this third day of March, 1831, personally came and appeared Robert F. Stockton, proven to my satisfaction by the oath of Thomas A. Emmet, esq., to me personally known to be the same person mentioned in the annexed deposition, and who subscribed the same; and the said Robert F. Stockton being duly sworn, did depose and say, that the contents of the said annexed deposition, by him subscribed, are true.

Witness my hand and seal of office, at the city of New York, the day and year first above written.

THOS. JEFFERSON SMITH,
*Penn'a Commissioner.*

Also proof that the plaintiff, having sued the defendant in the circuit court of the United States for the district of New Jersey, the defendant therein confessed judgment to the plaintiffs on the first day of October, 1829, for the sum of twenty-four thousand six hundred and fifty-two dollars and eleven cents.

And the testimony of Rodney Fisher, orally delivered, as follows: I was the agent of John R. Thomson in the course of the year 1825. As such I negotiated a loan of money with Magniac & Co. for Mr. Thomson. These I believe to be the invoices. Invoice by the Addison, 22 November, 1825, $\$42{,}138\frac{34}{100}$, on which I took up from plaintiffs $30,000 *at* payable in Philadelphia in bills on London; on arrival in Philadelphia, in bills of usual sight, at 60 days. The other ship, Superior, 2 December, 1825, $\$44{,}041\frac{13}{100}$, on which was ad-

vanced $33,000 on the same terms as on the other invoice. These are the bills of lading for the invoices, same date, endorsed in blank. I made a statement of J. R. Thomson's affairs, taken from his books. I supposed him, in the spring of 1824, to be worth $30,000. Commissions received by Thomson & Co. per ships William Savary, W. Sims, and Addison, previous to the death of R. R. Thomson being known, $17,923 49/100. Commissions received by him per Benjamin Bush and Thomas Scattergood, after R. R. Thomson's death in [the] spring of 1825, $10,037 76/100. Commissions per Addison, Superior, and W. Sims, fall of 1825, $21,069 83/100. Overcharges on those commissions, $1,156 66/100. Invoices per account of Mrs. Ann Thomson per Superior, $10,436 68/100; per W. Sims, $4,997 66/100. Profits on 30 seroons of cochineal, suppose $3,000. I think render total $98,622 38/100. Deductions, debts paid by me after his departure in China, $7,548 29/100.

| | | |
|---|---|---|
| Invoice by Addison and Superior, Magniac & Co. loan - | | $86,297 47 |
| Nett amount of loans - - - - - - - - | | 61,002 00 |
| | | 25,295 47 |
| Amount overpaid Ed. Thomson in his Canton account, on shipments in fall of 1825 - - - - - | | 2,670 29 |
| Debts paid by me in China, as above stated - - - | | 7,548 29 |
| | | $35,515 05 |

Invoice per W. Sims, $31,343 51; loan by Honqua, 16,000 00 at 14 per cent. Loss on invoice unknown. Fall of 1825 I shipped him about $2,400. I had factory and furniture, which produced about $ . J. R. Thomson left Canton on 1st March, 1825, to come to the United States. The loan of $60,000 from Magniac & Co. was taken up eventually for the use of Ed. Thomson. J. R. Thomson desired me to take up money for the purpose of filling the ships; he introduced me, before leaving there, to Magniac & Co. for that purpose. If Ed. Thomson had had funds of his own to have pledged, the loans would have been taken up directly for him; but, by the practice of J. R. Thomson, and the conversations we had, I considered myself bound to take them up in this way. The credit of J. R. Thomson was used for Edward Thomson. The compensation of John was the augmenting his commissions. In the Scattergood, in which he returned home, I think he did the same thing. The loan by Magniac was taken up in November and December, 1825; they knew nothing of Edward Thomson. I did not anticipate there would be a loss on the teas beyond the freight. I did not suppose that John Thomson would lose any thing by the teas, or Magniac & Co. The loan of Honqua was made in the same season—12th or 14th December, 1825. I did not presume there would be any loss on those teas. I took up the loan of Honqua; both of these loans were taken up under general powers of John R. Thomson; they were not particularly directed, but were under general orders. I did what I thought was required of me. He had no knowledge that these particular loans would be taken; it

depended on what the ships brought out; had they brought out funds, there would have been no loans; the funds were generally short, and some loans might have been expected; it had been the usage for two or three years. Magniac stated that he considered that J. R. Thomson had made the arrangements, and I only was to name the sums. He did not know I had a power of attorney. I believe an instance, by the Scattergood, where John pledged his own funds—$20,000 from Dent, and $16,000 from Honqua. I do not know whether there was a loss. I rather think, in the case of Dent, he took it up for himself, and had the management of it; but he took it up for the purpose of filling a ship. His orders to me were general. He referred me to Dent and Magniac if I wanted money. He was consul when he left China; I think he contemplated remaining in America—was undetermined—appointed me consular agent. I had no personal interest in the loans. Ed. Thomson had no credit in China. The first news of his failure was a paragraph in a London paper, August, 1826.

It was agreed that Ed. Thomson failed 19th November, 1825.

To maintain the issue on his part, the said defendant gave in evidence the following written statement as that on which the marriage settlement was founded:

*Statement by John R. Thomson, made previous to settlement.*

I have no personal debts, except to a small amount, in common course of business and living. I am surety for my father in a respondentia bond to Messrs. Schott & Lippencott in a penalty of two hundred thousand dollars. If the goods which are pledged sell reasonably well there can be no loss, for the freight on these goods, the commissions in China, and the premium on dollars on the outward investment, all tend to enhance the security; and such is the opinion of Mr. Schott, expressed to me in a conversation on this subject. There can, therefore, be no demand on me.

Upon no fair principle of calculation could the loss, if it should happen, be more than $20,000, and I consider myself worth that much, if not more, in addition to the sum proposed to be settled.

December 19th, 1825.

JOHN R. THOMSON.

Endorsed by Richard Stockton: "Statement made to the trustee by J. R. Thomson as the basis of the settlement, and upon which it was made.

(Signed) R. S."

And the oral testimony of George Thomson, as follows: "In May, 1826, John R. Thomson called on me with an invoice by the W. Sims, in the hands of Peritt & Cabot, requiring an advance of $20,246 $\frac{40}{100}$, the amount of Peritt & Cabot's lien on the goods. We required of Thomson a greater security than the invoice of $31,343 $\frac{50}{100}$. He put into our hands an invoice by the Superior of 10,436 $\frac{88}{100}$, on

which two invoices we made the required advance, $18,517 35/100. We paid for Spanish dollars to S. & J. Nevins. We got the goods and sold them; secured the duties, and paid them; no charge for freight; it was Mr. Thomson's ship. I made a summary estimate, $9,645 44/100. The other invoice lost in about same proportion. Sales in May, June, and July, 1826. On the final sale of both invoices, balance due, $6,925 12/100. We paid by order of J. R. Thomson to Joseph P. Norris, junior.

There was not more difference than usual between the invoices. Manhop, the Superior; Honqua, the W. Sims, cost 46 to 47 taels; usual cost before, 35. And the testimony of Peter Machie, who exhibited a written statement of John R. Thomson's affairs—his loss by his father was somewhere about $20,402 36/100; that is taken from the books; this comprises half of a joint loss of Richard & John R. Thomson. And the residue, his own loss; half balance due Thomson & Co. - - - - - - - - - - - - $11,499 09
On his own account - - - - - - - - 8,903 27

$20,402 36

In 1825 I gave J. R. Thomson credit for $30,000 on five ships; three of them sailed previous to the arrival and death of Richard R. Thomson, directed to Thomson & Co., Canton, of which firm John was the surviving partner. They sailed in May, and Richard died 24th June, 1824. I adjusted the accounts of Thomson & Co. here, after Richard's death. I remember well a dispute arose as to the commissions of the first three ships, whether Richard's estate was entitled to one-half. How it was settled I do not know. Rather think there were written articles of agreement. If entitled to half, it would diminish the commissions by three ships, about .

J. R. Thomson lost by his father, it was known, at the time of his father's failure. Ed. Thomson sold goods and appropriated the money to his own use. John's amount was for goods he brought with him in spring of 1825. He put them in himself. Some goods unsold at his father's failure—not to any amount. When he was in town he lived at his father's house; greater part of his time absent, recreating and enjoying himself. He went to Canton in the spring of 1820 or '21; was in a bad state of health there.

And by Joseph P. Norris, junior, as follows:

From the time of John R. Thomson's return from China, in 1825, I have been intimately acquainted with his commercial business. His father, I believe, was his only bondsman at the custom-house. Wm. Korn became uneasy after the father's failure, and I signed his bonds. From time to time I have seen every operation. He was in my debt in 1827; something at all times. As recently as 1829, 1830, I lent him a small sum, with a view that he might be benefitted by getting some employment. He is in my debt a considerable sum of money, and from my knowledge of his affairs I sincerely believe he is unable to pay me a single sixpence. I have no hesitation in saying he owes

me a considerable sum, for debts contracted since his return from China. The sums lent generally for personal expenses; a portion may be for bonds paid at the custom-house. He arrived in the beginning of the summer of 1825. Note of Wm. H. Morris & Co. I think was paid him by his father before his failure. Wm. H. Morris & Co.'s debt was an old one, a doubtful one. The note was given to Ed. Thomson, and by him endorsed to J. R. Thomson. I am not aware of any new operations by him; he is not in any business now, except is secretary of the railroad company. I think I know of the engagement of J. R. Thomson with Miss Stockton, in July, or beginning of August, 1825, and knew of the proposed settlement shortly afterwards, before September, in the same year. I have advanced to him for personal expenses since his marriage, not before. By the two years' expenses in my statement, I mean 1825 and 1826.

The defendant further proved that he had paid the plaintiffs, on the 28th May, 1827, the sum of twelve thousand two hundred and eighteen dollars and two cents, towards satisfaction of the debt in question.

Whereupon the court, having heard the arguments of counsel, charged and instructed the jury as follows, viz:

Nominal parties are plaintiff and defendant; real, plaintiffs and defendant's wife.

Nominal question is, whether defendant has any property; real question is, whether property he owned in December, 1825, passed to Richard Stockton, father and trustee of Mrs. Thomson, for her use; or whether it remained in defendant, on account of the legal inefficacy of the marriage agreement to divest him of it, and vest it according to that agreement. If it was operative in law, the house, furniture, and fund in hands of Robert Stockton, belong to him in trust for the uses of the agreement. If not, then the law deems J. R. Thomson to be the legal owner in trust for his creditors, of whom the plaintiffs seem to be the only ones. He remains the owner, not because the agreement is not binding on him, but because, under the circumstances of the case, his indebtedness to the plaintiffs put it out of his power to so divest himself of it as to prevent his creditors from considering it his, so far as to be a fund for the payment of their debt; and this is the only question we have to settle. From the evidence the plaintiffs' debt is a fair and valid one as between them and defendant; between him and Mr. Fisher it is not our province to inquire; that depends perhaps on the evidence of authority which the latter can produce, but his evidence is sufficient for the plaintiff to show a debt existing at the time of the marriage agreement. The judgments confessed by Thomson are evidence, not only against him, but, as they may affect the interest of his wife in the property in question, to show the indebtedness of Thomson at the time of the agreement. (11 Wh., 210–'11, Hinde vs. Longworth.) Taking the judgment in connexion with the testimony of Mr. Fisher, you will probably think the plaintiffs' case is so far made out as to establish the existence of a valid, legal debt due plaintiffs by defendant at the time of the marriage settlement; and no evidence being given to impeach

the claim, we think, in point of law, it is so, unless you feel at liberty to discredit Mr. Fisher. Though Mrs. Thomson is no party to the judgment, it is evidence to affect her claim.

This brings us to the main question of the validity of the marriage settlement on which the cause must turn.

It is good between the parties, and good as to all the world, unless it is liable to impeachment for fraud, which is of two kinds, fraud in fact and fraud in law. The first is an intention or design to defraud, delay, injure, or prevent creditors from receiving their just debts by a sale, deed, settlement, or agreement, by which the property of a debtor is withdrawn, or attempted to be withdrawn, from their reach. The English statute, of 13 Eliz., declares all such acts null and void as to creditors; this statute is in force here, and you will consider it as having the same effect in this cause as a law of New Jersey. The common law makes the same declaration, and if the evidence brings this case within it, your verdict must be for plaintiff. Proof of fraud may be made out by direct evidence, or may be inferred from such circumstances as will justify that inference, but a jury ought never to presume it without either; you ought to be satisfied that the facts before you indicate, and reasonably prove, the existence of that dishonest fraudulent intention which brings the case within the true spirit and meaning of the law. A mere doubt or suspicion of the fairness of the transaction ought not to be sufficient to lead to the finding of any act to be fraudulent, unless the conduct and situation of the parties, and the effects intended to be produced by the act, appear inconsistent with their integrity, and admit of no reasonable interpretation but meditated fraud to be effected by the agreement, sale, or deed. On this subject, the law does not remain to be settled by this court; it is laid down by Judge Washington, and adopted by the Supreme Court, in case of Conard vs. Nicholls, 4 Peters, 295, '6, '7, and must be considered as binding on court and jury in deciding on this part of the case.

To taint a transaction with fraud both parties must concur in the illegal design; it is not enough to prove fraud in the debtor; he may lawfully sell his property with the direct intention of defrauding his creditors, or prefer one creditor to another; but unless the purchaser or preferred creditor receives the property with the same fraudulent design, the contract is valid against other creditors or purchasers who may be injured by the transaction. The declarations or admissions of the debtor as to the object intended to be effected, are evidence to contradict his answer to a bill in chancery brought to annul the act alleged to be fraudulent, but not to defeat the title of the grantee or person claiming under it, or to have a bearing on the whole case; 2 Peters, 119, 120, Venable et al. vs. Bank United States; 2 Halst., 173; 4 S. P. Before you can pronounce this marriage agreement void and inoperative on the ground of actual fraud, you must be satisfied not only that the defendant made it with design to defraud his creditors, but also that Mrs. Thomson, and her father and trustee, Mr. Richard Stockton, participated and concurred in the fraud intended; if they were

innocent of the combination, it would be harsh and cruel in the extreme to visit on her the serious consequences of her intended husband's acts, and as inconsistent with law as justice.

The facts of the case are neither complicated or contradictory, affording evidence much more clear and satisfactory than usually appears in such cases; it appears that John R. Thomson, after residing some time in Canton, left it in March, 1825, and returned to this place in June following; that he paid his addresses to Miss Stockton during the summer, contracted an engagement of marriage with her, and contemplated making a settlement upon her as early as September; that the marriage articles were executed on the 19th December, and the marriage solemnized a few days afterwards, or perhaps sooner. He built a house on the lot mentioned in the agreement, at an expense of 13,000 dollars; furnished it at the expense of 5,000; but invested no part of the 40,000 during the lifetime of Mr. Stockton. In September, 1829, he put into the hands of Captain Robert Stockton, who succeeded his father in the trust, securities to the amount of 9,500 dollars on account of the sum to be invested pursuant to the settlement. From the evidence of Mr. Fisher and Mackie, it appears that Mr. Thomson was worth, say in December, 1825, about 80 or 90,000 dollars in money and personal property, and owed 70,500, of which 7,500 were on his own account, due in Canton, and paid by Mr. Fisher. The residue was the 63,000 borrowed by Mr. Fisher on 22d November and 2d December, 1825, from the plaintiff, on the credit and on the alleged authority of Mr. Thomson, but entirely for the use of his father, Edward Thomson, in order to complete the cargoes of his ships then at Canton, short of funds. We have no evidence of any other debts which would materially diminish the sum which he was estimated to be worth. This large debt was contracted, not by any specific, but general directions or orders; it was unknown to him till the spring of 1826 that such a debt existed, and therefore could not have been in his contemplation when the marriage articles were executed; they could not have been entered into for the purpose of defrauding the plaintiff, and he appears to have had no other creditors, unless those who were paid by Mr. Fisher, in Canton, out of Thomson's funds in his hands. The security given to the plaintiffs exceeded the amount of the respondentia bond 23,300, which may fairly be presumed to have been invested in the invoices pledged to plaintiff out of his own funds, as there is no evidence that this sum was raised by loan on the goods purchased on credit. This, added to the other debts, amounting to 7,548, makes 30,748, which would seem to have been raised without contracting a debt. Defendant pledged 23,300 of this to secure the plaintiffs for a loan made for the use of Edward Thomson, and made Thomson personally liable in the bond. If the contracting a debt in this manner, by which there could be no profit but commission, and might be attended with heavy loss, was intentional fraud, then you will judge whom it could have been intended to defraud, Magniac or Thomson. If there was any part of the debt lost,

it must fall on the latter; the former could not suffer, unless the proceeds of the two invoices produced less than 63,000, and Thomson became insolvent. If under such circumstances you find that there was meditated fraud, it will be hard to discover a motive which could operate on the mind of defendant to his own benefit, or injury of plaintiff.

This debt not being contracted personally by Mr. Thomson or his special directions, it would be difficult to infer any fraud in him in borrowing the money, and still more so in his agent, Mr. Fisher. It cannot well be doubted that it was the intention of the one in conferring the authority, and of the other in executing it, to comply with every stipulation for repayment, or that in entering into this agreement of marriage all parties were ignorant of the existence of the debt. The mortgages of the invoices of 86,000 for security, is most powerful evidence to negative fraud of any kind. These are the most material, and probably all the facts of the case, necessary for your consideration of the question of fraud in fact. You will apply the law as read and stated to you, to the evidence, and decide according to your convictions of the justice of the case. As a question of fact, it is for your exclusive decision. The court, however, think proper to say that, in their opinion, an inference of intentional fraud would be a very severe comment on the conduct of the parties.

If, however, you should be of opinion that there was such fraud attending this transaction as brings it within the legal principles laid down for your guide, you will find accordingly a verdict for the plaintiff.

Another part of the issue which you are to decide is, whether the defendant has concealed, and has in his possession, disposal, or command, any part of the property he owned in 1825, amounting to 80 or 90,000 ds., which has been accounted for as by statement of Mr. Fisher and Mackie, leaving the sum of twenty-five or twenty-six thousand dollars, which has been shown to be invested in the house furniture and securities in hands of Capt. Stockton. Connecting this with the evidence of Mr. Norris, you will be able to decide whether defendant has any means of paying the plaintiff's debt, of which he has not given an account, or which remain in his hands.

In tracing through the evidence [of] the conduct of the defendant towards the plaintiff, in relation to this debt, you will discriminate between the deliberate design to defraud, by secreting property for his own use, and losses incurred by casualties and want of prudence or discretion. On this part of the issue you are to inquire only as to the property which he actually has in his possession or control, not into what he ought to have had, or what he has disposed of for any other use than his own; and will not take into consideration what has been expended or applied towards the marriage contract, that being the subject of the first inquiry, which is altogether distinct from this.

The next and most important question is, whether the marriage contract is fraudulent in law, and for that reason void as against the

plaintiff; that is, although the intention of the parties was fair and honest, and the act done without any design to defraud, the policy of the law forbids its execution, and takes from it all legal efficacy as to the creditors of John R. Thomson. The deeds, gifts, grants, or other contracts which the law avoids, are those made with intent to defraud, hinder, delay, or injure creditors; and, in order to avoid them, both the party giving and the party receiving must be participating in the fraud. On this subject the law is written, and cannot be misunderstood. The 6th section of statute, Eliz., ch. 13, provides that the act shall not extend to any interest in lands, or goods and chattels, made on good consideration, bona fide lawfully conveyed or assured to any person not having, at the time of such conveyance or assurance to them, made any manner of notice or knowledge of such fraud, covin, or collusion.

The words of the law require that both parties must concur in the fraud, in order to bring the case within its provisions; and such has been its settled judicial exposition for 260 years.

There are in law two kinds of considerations; good, which is natural love and affection; and valuable, which is money or marriage. The word good is used in this law as applied to cases which it does not mean to embrace; but, from the evident meaning and object of the law, to protect creditors from the disposition by debtors of their property with intent to defraud them, and from dispositions which might produce that effect, by conveying it to their wives, children, relations, or friends, all courts, both of law and equity, have considered the word good as meaning valuable consideration.

You will perceive that the law, as thus expounded, embraces three kinds of conveyances:

1. Those made with the intention in both parties to defraud creditors. These are void, whether made with or without consideration; good or valuable, not only on account of the covin or collusion, but as exempted from the saving of the sixth section, not being bona fide.

2. Voluntary; made for good consideration, but tending to defraud creditors, if they are permitted to have a legal operation to vest the property conveyed. The policy of the law makes them void for legal fraud, though there is no fraud in fact, the fraud in law being deemed equivalent to it.

3. For valuable consideration in good faith, without notice by the person receiving the conveyance of any fraud, covin, or collusion, by the grantor, to defraud his creditors. These are excepted from the operation of the law before referred to. They are good and valid, at common law, to pass the property conveyed; and purchasers under such conveyances are entitled to and receive the protection of all courts of justice.

From what has already been given you in charge on the subject of actual fraud, you will be enabled to decide whether this case comes within the first class of cases of intentional fraud in both parties to the marriage contract. If you are not satisfied that this contract is of this character, then it cannot fall within the second class of voluntary con-

veyances. If it was made in contemplation of marriage, it was made on a valuable consideration, and puts the intended wife on the footing of a purchaser for money, and not of a voluntary grantee or donee for the mere consideration of love and affection. She is not to be considered in any court as a volunteer, but comes into court at least on an equality, both in law and equity, with any other parties whose claims are founded in money. You will not forget the difference between a provision for a wife and children before and after marriage. It is the difference between a purchaser and a volunteer. For the former, the consideration is as valuable as the debt due a creditor, or the money received from a purchaser. In the latter it is from its nature merely voluntary; there can be no other than a good consideration for making it. There exists, it is true, a moral obligation to provide for their support and comfort, but that moral obligation must yield to the legal one which every man must observe towards those who have just claims on his property. In dispositions of property which take effect in the disposer's lifetime, as well as after his death, there is a golden rule which applies to all—a man must be just before he is generous. This applies in all cases between volunteers, or those claiming merely by a voluntary disposition made by deed or will to those who have no legal claims on the person who makes it on the one hand, and creditors and purchasers on the other. But where conflicting claims between creditor and creditor, purchaser and purchaser, or purchaser and creditor, arise in court, they are settled by other rules. The first inquiry, as to them, is whether one class has a legal right to the debt claimed, or the other to the thing claimed to be purchased, such as is recognised in a court of law; the second is whether that right has been so acquired as to be attended with such circumstances of fraud, accident, mistake, trust, inadequacy of price, or unfairness, as will annul or modify it in a court of chancery, according to the established principles of courts of equity.

Creditors have, as between them and the debtor, an undoubted right to so much of his estate as will pay their debts, but the debtor has a right, equally undoubted, of preferring one creditor to another, or giving all his property to one. This is neither fraud in law or fact, in the absence of covin or collusion. A debtor may sell his whole estate, turn it into money, and distribute it among his creditors at his pleasure. Those only who have liens on it can, in either case, have any resort to the property in the hands of a bona fide purchaser, or creditor who has fairly received it in payment of his debt. These are known principles of law, long settled and established by universal consent and adoption in our system of jurisprudence. They form rules of property and title on which the peace of society and security of rights essentially depend. They cannot be shaken by courts or juries, without producing endless confusion, uncertainty, and want of confidence in the administration of the laws of the land.

We will then apply them to the case under our consideration, in order to ascertain by their bearing on its merits whether it comes within

the third class of cases, which we have seen are excepted from the provisions of the statute.

A contract in consideration of a future marriage is of that nature which creates a legal and equitable obligation on the parties to perform it in good faith according to its stipulations; the consideration is good and valuable in contemplation of the law, as if it was made on the loan or payment of money; if the contract is executed, the parties become purchasers; if it remains executory till after the marriage, they become creditors on its consummation, or assume pro tanto the character, and acquire the rights of both; if executed only in part, they are entitled to the protection of all courts in the enjoyment of what is granted, and to their aid in enforcing the performance of what has been stipulated to be done; and where either party can rightfully call on a court of law or equity to compel the other to perform an act necessary to the execution of the contract, and the judgment or decree of the court would be given in his favor, a voluntary performance of the legal or equitable obligation would be equally valid. The consideration being valuable, if the contract, whether executed or executive, is made in good faith with one having no notice or knowledge of any fraud, covin, or collusion to defraud creditors, performance may be enforced or voluntarily made, and the contract carried into execution at any time, either in whole or in part, as is in the power of the party, and whatever is so done will be as valid and binding between the parties, and in relation to third persons, as if the execution had been completed on its date. The law is express in referring to the time of the conveyance and assurance, and embraces not only perfect grants or gifts, but any estate or interest in lands, goods, and chattels made, conveyed, or assured. On these principles, it is the opinion of the court, that the evidence in this case brings the marriage contract within the 6th section of the law, excepting it from the operation of the first section, unless you shall find that it was made not bona fide, or with notice or knowledge of a fraud in John R. Thomson in entering into it, brought home to his intended wife, and that Thomson actually entered into it with such fraudulent, covinous, or collusive intention.

If you do not find such want of good faith or existence of notice, then Mr. Richard Stockton must be considered at law as a purchaser for valuable consideration, bona fide, and without notice. So far as the contract has at any time been proved to have been executed by Thomson and his creditor, so far as remains to be executed, and Mrs. Thomson as having the same character in equity, and Capt. Stockton as invested with all the rights, and standing in all respects in the situation of his father.

The aspect in which these considerations present the case is a contest between Mr. Stockton and Mrs. Thomson, the one the legal and the other the equitable purchaser of the house, furniture, and securities, from John R. Thomson by the contract, and in consideration of the marriage, and the lot as the marriage portion, and the plaintiff his sole creditor. Thus they stood at the commencement of this suit, and

as creditors, at the time of the contract and consummation of the marriage, they having performed their stipulation, had a perfect right to call on Thomson, both at law and equity, to perform his. If Mrs. Stockton is a purchaser, she is one of the most favored class; the consideration she has given is as valuable, and as much to be valued, as money—it is not necessary to consider it as more so; she is invested with the acknowledged rights of a money purchaser; a conveyance of real or personal property made to her before marriage by her intended husband of real or personal estate would be as valid and effectual, although he was in debt, as if he was not. If he had the legal title to the thing conveyed, and power to sell, the interest and beneficial use would vest in her and her trustee, by the deed, as fully and completely if the property had been held in trust for others, as if Thomson had a right as perfect in equity as at law, provided she had no notice of the trust. This is a universal principle, never questioned, and protects all bona fide purchasers, for valuable consideration, without notice, before the money paid or the condition of the grant performed. The application of this well known and acknowledged rule of law to Mrs. Thomson does not make her a prerogative or a privileged purchaser; it only puts her on the footing of every other purchaser from one who has the legal title, subject to an unknown trust for the use of a third person. This case is of the strongest kind against the cestui que trust, if the plaintiffs can be so considered, and they cannot be placed in any attitude which can give them better rights than in that, for the debt was contracted with them but a few days before the date of the marriage articles, and in a quarter of the world so distant as to preclude the possibility of notice to other parties. In the common case of a trustee conveying the legal estate to the injury of cestui que trust, the trust exists at the time of the conveyance; it is necessarily known to the trustee, and notice may be brought home to the purchaser by direct or circumstantial evidence as in all other cases, but in this it could be done by no possibility.

When the law is so well settled as in the case of a conveyance by a trustee to one having no notice of the trust, it can have no effect to urge any arguments of hardship on the person injured; we could not change the law on the subject if we would, and should violate our duty not to so declare it. It is a hardship on a widow or an orphan, who has been defrauded by her trustee in selling what is not his own but theirs; but it is great, if not a greater, hardship on the widow or orphan to be deprived of property which they have purchased and paid for by money earned by their industry, and deprived of that on the faith of which they have devoted their lives to a husband, and placed at his disposal their future happiness and last cent. A loss must fall on one of two innocent sufferers, whose claims may be supposed equal in justice and equity; in such case the law leaves the property with the one who has acquired the legal title by fair purchase in good faith and without notice; and a creditor of a fraudulent debtor who sells or settles on his intended wife property which he is bound both in law and

equity to apply to pay his debts, can on no principle be more favored in any court than the person whose property is unjustly conveyed by a trustee to pay his own debts, to rob one family in order to save another, or secure a provision for an expected one of his own. A creditor is no where more favored than the infant, the ward, the widow, or orphan, whose property is in the hands of trustees without lien or security, and subject to his disposition by deed or bill of sale.

The creditor of a deceased debtor has the same right to the payment of his debt out of his property as of a living one; yet a sale of the personal property of a deceased by an executor, administrator, or trustee, to pay his own debt, is good against creditors, the widow and next of kin, if made without notice or collusion, and no court of chancery will annul it; yet it is as much a breach of faith, as deep a violation of moral honesty, as to settle the same property on an intended wife, to whom he was under as high and imposing obligations to perform his contract of marriage, by paying the promised consideration on which it was solemnized, as to discharge a bond given for money lent or property purchased.

These are general principles and rules of law which we feel confident are the pre-existing laws of this case, and as such lay them down to you as the legal rule for your verdict; we should make, instead of expounding the law; act as legislators of new rules, and not as judges, expositors, and administrators of old, and well established ones, in declaring that Mrs. Thomson is in this case to be viewed in a less favored light than a purchaser, in consideration of money or property.

The consideration of the contract on which this cause depends is both marriage and property; the value of one cannot be, and the other has not been, ascertained in dollars; but we think the justice of this case can be attained without doing either; considered as a purchase made in good faith, and the purchase money paid without notice of any fraud by the intended husband, we know of no principle by which it can be declared void in a court of law; we know of no case in which a conveyance of real or personal property so made has ever been, or agreeably to legal principles could be, annulled and set aside, on any reason founded on mere inadequacy of consideration; all that is required to render a conveyance valid at law in that respect, is that there be some consideration; the amount is not material, and cannot be inquired into, either as respects the grantor, his creditors or subsequent purchasers of the same property, in the absence of actual and legal fraud in the grantor, or notice of it to the grantee.

The only resort of the parties who complain of any equitable fraud or other circumstances, which would invalidate it in equity, is to those courts; they only can decide upon the adequacy of a pecuniary fraud, or the equality of marriage to a given sum of money, or value in property, under the circumstances of the case. Cases may exist in which a court of chancery would compare and estimate them for the relief of a creditor as purchaser, or perhaps the party in a strong and

clear case of injustice; when such a case occurs it will be time to give an opinion on it; as yet we know of no instance in which a court of chancery have set aside a purchase for a valuable consideration, or a marriage contract, when made bona fide, and without notice of fraud or defect of title; those claiming under them have ever been the peculiar favorites of such courts, and their rights can never be disturbed, unless in some extreme case of such a nature as to call for the application of old rules and principles to a new state of facts which have never yet been presented to a chancellor. Truth is not yet to be elicited by forced comparisons and extravagant suppositions, or extracted from extreme cases of rare and barely possible occurrence; the rules of law have been settled to meet the common occurences of life, which come within the cognisance of courts of justice; extreme cases may arise, and though necessity may have no law, yet there are rules for all exigencies; but they are only to be applied when they arise; they differ much from those which regulate and govern the ordinary common contracts of society. The court perceives nothing in the one now under our examination, which gives it any unusual features. At the time it was entered into, if you view the evidence as we do, Mr. Thomson, so far as he could judge, was abundantly able to make the stipulated provisions for his intended wife, without doing any injury to the plaintiff, or any other person; he has given evidence of losses enough to account for his inability to comply either with his contract with his wife, or plaintiffs, but they were unforeseen at the time they happened, not by his dishonesty or even imprudence. An investment was made by his agent without his knowledge, the money was borrowed, the purchase and shipment made by Mr. Fisher in good faith, and in the exercise of sound discretion. But what cost $86,300 in Canton produced less or not more than 40 in Philadelphia; it has been a calamity by which the defendant has suffered, and most suffer; his wife must lose $30,000 of her settlement, or the plaintiffs lose $12,000 of *his* debt; even admitting their equities to be equal, she has a legal advantage which no court can take from her; unless her conduct can be impeached for actual or legal fraud, it would be as unjust as illegal, and inequitable to visit alone on her the misfortunes which attended her husband's affairs. Considering Mrs. Thompson, then, as purchaser under the marriage articles, we are decidedly of opinion that there is no legal fraud attending the transaction which would invalidate it in a court of law, or any matter given in evidence which would impair its obligation in a court of equity; the nature of the issue seems to us to require both views to be taken. If Mrs. Thomson can not be viewed as the purchaser of the property contracted to be invested for her use, she is certainly a fair and honest creditor from the time of its execution, if not from the time of the proposed settlement in August, after the engagement of marriage was made; if she was a creditor on the 19th December, Thomson had a right to prefer her in preference to any other creditor, to the extent of his whole property whenever he could realize or reduce it into possession. The mere priority of the plaintiff's

debt in point of time gave him no such legal or equitable priority, of payment as to prevent the marriage agreement from having a legal efficacy on the parties; though Mr. Fisher had a previous authority to contract it, it could not cut out the inchoate rights of Mrs. Thomson, by the engagement and proposed settlement in the summer of 1825, which, you may fairly infer from the agreement was in the course of execution by Thomson, having begun to build a house on the lot, of which Mr. Stockton was to stand seized in trust before the date of the articles; and the deposition of Capt. Stockton is that it was built in 1825 and 1826. These circumstances may be thrown out of view on both sides, and the rights of the respective parties be tested at the time of the consummation of their respective contracts; that of the plaintiff on 22d November and 2d December, and Mrs. Thomson's on the 19th. If they were both fair creditors, Mr. Thomson had a clear, undoubted right to prefer either, and pay the whole debt out of any property on which the other had no lien; and we are of opinion that she might be considered as a fair creditor to the amount of the promised settlement, made under circumstances which we think wholly insufficient to justify its being rescinded, in whole or in part, in a court of law or chancery, unless it was attended with actual fraud. If it had comprehended his whole estate, and the certain consequence of being carried into effect, or the intention of the parties had been to exclude the plaintiffs from the payment of his debts, under cover of the agreement, on the equity side of the court we would give him relief. But this case seems to us to have no such character; the intervention of unexpected losses alone, and neither the effect of the agreement, nor the intervention of the parties, have produced the existing state of things which, if not changed by your verdict and our judgment, will leave the parties thus: The plaintiffs' debt was nominally 63,000; the sum actually received by Mr. Fisher 61,002, bearing an interest of  per cent., of which he has received all now due, principal and interest, except about 12,000; that of Mrs. Thomson, estimating the house and furniture at 18,000, amounts to 58,000, of which there is yet due 35,000, if Morris's debt is not good, or 30,500 if it is good, besides interest from December, 1825. Though this inequality of loss might and would not be of any importance to her in a court of law, it would be a powerful circumstance in a court of equity, to which the plaintiff would apply for relief from alleged hardship. The time at which the contract was made, and the circumstances then attending it, connected with the situation of the parties at that time, furnish the proper criterion by which to ascertain their respective rights. If they have changed by events happening since, and are to be governed by their situation at the commencement of the suit, it is important to view the change of the marriage contract. Instead of withdrawing the 40,000 to be invested for the use of Mrs. Thomson, it has been reduced to 5,000 certain, or 9,500 contingent. Had this been the original stipulation, it would hardly have been deemed an unreasonable or disproportionate consideration for the marriage; of the

sum promised, and interest, she will in no event receive more than one-fifth, and possibly only one-tenth, from the wreck of Mr. Thomson's property; while the plaintiff has received more than the half of what remained due him, after deducting the proceeds of the two invoices, of which no part went to Thomson or his wife, but the whole was applied to the plaintiff. It is also an important matter, as it affects the character of the two contracts at the time they were made, that Thomson gave no security, and pledged no specific fund, for the investment of 40,000; but as security for the repayment of an actual loan of 61,002, the plaintiff received as security goods of which the *the* prime cost was 86,300.

This view of the merits of this cause seems to the court to be sufficient for the decision of the points directly at issue. Others have been made, and ably argued, by counsel on both sides; but we are not disposed to trouble you with a discussion not necessary to a correct decision of the question between the parties. The cause has been tedious, and its examination sufficiently laborious. We shall not, therefore, investigate the doctrine of voluntary conveyances or contracts of marriage made after it has been consummated, they not partaking of the character of purchases, in consideration of money or marriage. In the first class of cases, the existence of debts due by the grantor, at the time of the deed or contract, has a very important, if not decisive, bearing on their validity. As to creditors, the law is not clearly settled; so as to their effect on subsequent purchasers. But it has never been decided that a deed conveying to a bona fide purchaser, or an intended wife, is in any manner impaired by the mere existence of pre-existing debts; and to this class of cases alone is it necessary for you or the court to direct their attention.

The rules we have expounded to you as controlling this cause are such as are founded on principles which are assented to by counsel on both sides, they differing only in their application. There can, indeed, be no other question. If Mrs. Thomson is to be considered as a fair purchaser, without notice, or an honest creditor, her claims can only be *effected* by fraud in a court of law, or such a case of equitable jurisdiction as could induce a court to annul a conveyance made in consideration of money, or as security for a debt, or enjoin the assertion of any right accruing or claimed under it. The importance of the principle involved in this controversy made it our duty to examine it at large; and as the sum in dispute authorizes either party to take the cause to the Supreme Court for revision, we have given an opinion explicitly, so that the law may be fairly settled. We conclude, then, with instructing you that a settlement made before marriage makes the intended wife a purchaser; if agreed to be made, she is a creditor, and protected in the enjoyment of the thing settled, and entitled to the means of enforcing what is executory, if the transaction was bona fide, and without notice or fraud. The plaintiffs have made an objection to the operation of this deed, for the want of evidence of delivery. This is a question for you to decide. The evidence is sufficient to

prove it, if you believe the witnesses. The building and furnishing the house are facts tending very strongly to prove the delivery in a satisfactory manner. The law on this subject is well settled by the Supreme Court, in 4 Peters, 23, 28, 82, Carver vs. Astor. You will apply it to this case.

It has been said that the contract of settlement has been abandoned. It is not to be presumed; and we think the facts given in evidence do not amount to it. Every act contemplated to be done by either party has been performed, except making up the investment; the omission to complete it is not, in itself, sufficient to authorize you to find that the whole contract has been rescinded. So far as it has been executed, it is not open to any presumption of the kind; and the allegation of abandonment seems to be inconsistent with the charge of alleged fraudulent intention to defraud the plaintiffs. You may find if you are satisfied of the fact that the payment of the balance of the forty thousand dollars has been waived by consent of the parties; but this can have no effect on the investment actually made. The non-delivery of the securities for the 9,500 dollars till near the time when judgment was rendered in New Jersey, and the omission to record the marriage articles, have been relied on in aid of the presumption of abandonment; but, under the circumstances of the case, we do not think they conduce to prove it, (the case last referred to seems to settle this point, 4 Pet., 24, 98–'9,) and nothing appears from which an inference can be drawn that Mrs. Thomson, for whose benefit this contract was made, has done or consented to any act which could impair her rights under it. The omissions of her trustee to enforce the payment of the money, or to record the deed, cannot be deemed a waiver by her. If the trustee had done any acts inconsistent with the agreement, it could not affect the legal validity of her rights; and the acts of a parent will not be construed to be so, unless clearly intended. 4 Pet., 93–'5.

The court have been requested to charge you that, in point of law, the covenant on the part of Mr. Richard Stockton, to stand seized to uses, operated as an immediate conveyance to his daughter before marriage, and that by the marriage Thomson became the owner of the furniture in his own right, and had the exclusive use of the house and lot unencumbered with the trusts of the agreement. By the covenant contained in that agreement, Mr. Stockton was not to stand seized to the use of his daughter till after the marriage; if it is the understanding of the plaintiff's counsel that there is any evidence of any other covenant than this, we are unable to perceive it. The deposition of Capt. Stockton is positive that his father did not convey, but covenanted to stand seized of said lot, (prout deed;) this does not even conduce to prove there was any deed independent of the marriage articles, and evidently refers to it, which the court instruct and charge you, as matter of law, does not operate, by the statute of uses, (27, Henry 8,) to pass the legal estate to the lot, or any other property referred to in the agreement to Mrs. Thomson or the defendant. It re-

mained in Richard Stockton during his lifetime, devolved by his death on his heir at law, Captain Stockton, and now remains in him on a trust executory; it never was, and is not now, one executed by that statute. It is unnecessary to explain to you the reasons of this opinion, as it would perplex your consideration of the case with a dry detail of abstruse principles, neither amusing nor instructing to any persons except those whose professions or judicial duty may lead them to the investigation; as a sheer question of law, you will probably not be disposed to investigate it for yourselves.

The court are also requested to charge you on three other points of law: 1. That the expenditure of 5,000 in furnishing the house is per se fraudulent on creditors; we think not; furniture is part of the marriage contract to be provided by Thomson in a suitable manner as he should think fit; he had a discretion which he might exercise in a reasonable manner according to their station and associations in life, proportioned to the kind of house and extent of income; the trustee or wife could not in law or equity compel Thomson to furnish it extravagantly or at useless and wanton expense; and if he should do it voluntarily, it would not be within the true spirit and meaning of the marriage articles, and might be deemed a legal fraud on creditors as to the excess. But before we can say that it is a fraud in law to expend 5,000 in furnishing a house costing 13,000, and the establishment to be supported by the income of an investment of 40,000 in productive funds, we must be satisfied that it is at the first blush an extravagant and unwarranted expenditure under all the circumstances in evidence, and to an extent indicating some fraudulent or other motive unconnected with the fair execution of the contract of which we are not satisfied, and therefore cannot charge you as requested by the plaintiff's counsel, there being no clear abuse of the discretion confided by the contract to Mr. Thomson. A less expenditure on both house and furniture would have been more prudent and discreet in the situation of the parties in 1826, when the house was finished; something could have been saved for investment if less expense had been incurred, and 8 or 10,000 been made productive. Had this been done, there could have been little ground of complaint by a creditor; but as to him, it was immaterial how the money was expended; his only concern was in the amount, not the objects of the expenditure, so that they were according to the terms of the agreement; whether a given sum was applied to one subject or the other, or fairly proportioned among them, affected only the parties not creditors. 2. We are next asked to charge you that the delivery of the notes to Capt. Stockton in September, 1829, was a fraud; if it was done in order to comply in part with the agreement, it was not so; if it was colorable, made with the intention of covering and concealing so much, under pretence of the marriage articles, for Thomson's use, and so received by the trustee, it was legally fraudulent as to creditors; but if delivered with such intention, and not so accepted, then Captain Stockton might not only fairly apply it to the trust fund, but was bound to do so. Though it may have been done

on the eve of the judgment confessed in New Jersey, that would make difference, it being to carry into effect the agreement of December, 1825. Had it been to make a new settlement after marriage, if it was in consideration of a portion or property, it would not have been fraudulent per se; and the time which intervenes between the making provision for a wife, and the contracting the debt, or obtaining a judgment against the husband, is not a matter which per se makes it a fraud; it may or may not be suspicious, and connected with other circumstances evidence of it; 4 Wh., 506–'7–'8; Wh., 238, &c., 3 J., c. 485, 405.

The remaining point on which the charge of the court is requested is, that the marriage agreement is void, because not recorded within the time required by the law of New Jersey for recording deeds. The covenant, to stand seized to the uses declared, would come within this law, if the uses were executed by the statute so as to make it an actual conveyance or deed passing the legal estate; but, being executory, it is only a covenant giving an equitable estate to those for whom the trust was created and continues, and not a deed. But, considering it as a deed, the want of recording does not make it void as between the parties, though it would become void as to the creditors (perhaps) and purchasers from Richard Stockton without notice; but the omission to record it is no fraud on plaintiffs, and cannot affect him; not being void as between the parties, it gives to John R. Thomson no other estate or interest but such as arises from the trust; he cannot be entitled to any legal estate or interest under it incompatible with the nature and terms and objects of the trust. Our instruction, therefore, is, that the marriage contract is not void for want of being recorded in time.

The principles of law which have been thus expounded to you as the guides to your verdict, are all which are deemed by the court or counsel to be applicable to the merits of this case, or necessary to be understood, in order to decide it correctly; they form what, in our judgment, is the pre-existing law of the case, and have been extracted from judicial decisions which afford to our minds conclusive evidence of their wisdom and justice. The rules laid down are not new ones, either here or in that country which is the source of our jurisprudence, and to whose judicial tribunals the wisest and best judges will look without any fear of foreign influence—to some with veneration, and to all with respect—as the expositors of the same common law which, originated there, and adopted in this country, is the source of national pride to both, as a system equally distinguished for its wisdom and public benefits. It has not been thought necessary to cite to you all the particular cases in which judges have established these principles, or refer you to the time of their application, as the nature of the cases decided may have led to their development; this is more proper in courts of error, or in deciding in others questions referred solely to the court. The course pursued saves you much time, and relieves your minds from much perplexity; it does not produce any injury to the

parties; it saves you from a comparison between the character of the courts and judges who may have given judgments or opinions settling and declaring the rules of the common law or the construction of statutes. Whether we have, in forming our judgment as to the law of this case, drawn from the old and pure fountains of our jurisprudence, or the muddy rivulets which flow from them, need only be decided by that tribunal to whom none appeal without full confidence that it will, in justice, give such judgment as will correct all the errors of inferior courts. You will not be willing to confide more in your own judgment to correct any mistakes which this court may have committed in the instructions they have given you, than in that of the Supreme Court, to whom either party may submit this cause. Let our judgment be what it may as to the law, it can do harm to no one without their sanction; with their approbation, a safe rule of titles and property will be established; your judgment might not lead to one so sound or permanent. Much of what you have heard has been repeated from the adjudication of that court, much from those of England, their judges and chancellors, whose judgments, decrees, and opinions, have been carefully reviewed and approved by the pure and eminent jurists who have presided in our own courts; if, in following the path which they have pursued in the administration of justice, this court looks abroad as well as at home for light and knowledge to guide our course of legal investigation, it has been, and will continue to be, done without the fear of being misled by example, or the self-reproach of adopting in ours, or inculcating in your minds, principles unsound in law or dangerous in their moral tendency.

Though the domestic affliction of Judge Hopkinson has prevented a consultation with him on the details of this charge, I am authorized to say that he concurs in the result.

To which charge the plaintiffs excepted, and, at their request, the court set their seals to this bill of exceptions, in order that right may be done in the premises.

HENRY BALDWIN, [SEAL.]
JOS. HOPKINSON. [SEAL.]